

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Apr 13, 2021**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

FERNANDO H.,<sup>1</sup>

Plaintiff,

v.

ANDREW M. SAUL, the Commissioner  
of Social Security,

Defendant.

No. 4:20-CV-5092-EFS

**ORDER DENYING PLAINTIFF'S  
SUMMARY-JUDGMENT MOTION  
AND GRANTING DEFENDANT'S  
SUMMARY-JUDGMENT MOTION**

Before the Court are the parties' cross summary-judgment motions.<sup>2</sup>

Plaintiff Fernando H. appeals the denial of benefits by the Administrative Law Judge (ALJ). She alleges the ALJ erred by 1) improperly considering the medical opinions, 2) discounting her symptom reports, and 3) improperly assessing her residual functional capacity and therefore relying on an incomplete hypothetical at

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<sup>1</sup> To protect the privacy of the social-security Plaintiff and because she identifies herself as a female, the Court refers to Plaintiff as a female and by first name and last initial or by "Plaintiff." *See* LCivR 5.2(c).

<sup>2</sup> ECF Nos. 14 & 15.

1 step five. In contrast, Defendant Commissioner of Social Security asks the Court to  
 2 affirm the ALJ's decision finding Plaintiff not disabled. After reviewing the record  
 3 and relevant authority, the Court denies Plaintiff's Motion for Summary  
 4 Judgment, ECF No. 14, and grants the Commissioner's Motion for Summary  
 5 Judgment, ECF No. 15.

### 6 I. Five-Step Disability Determination

7 A five-step sequential evaluation process is used to determine whether a  
 8 claimant is disabled.<sup>3</sup> Step one assesses whether the claimant is currently engaged  
 9 in substantial gainful activity.<sup>4</sup> If the claimant is engaged in substantial gainful  
 10 activity, benefits are denied.<sup>5</sup> If not, the disability-evaluation proceeds to step two.<sup>6</sup>

11 Step two assesses whether the claimant has a medically severe impairment,  
 12 or combination of impairments, which significantly limits the claimant's physical  
 13 or mental ability to do basic work activities.<sup>7</sup> If the claimant does not, benefits are  
 14 denied.<sup>8</sup> If the claimant does, the disability-evaluation proceeds to step three.<sup>9</sup>

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16 <sup>3</sup> 20 C.F.R. §§ 404.1520(a), 416.920(a).

17 <sup>4</sup> *Id.* §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

18 <sup>5</sup> *Id.* §§ 404.1520(b), 416.920(b).

19 <sup>6</sup> *Id.* §§ 404.1520(b), 416.920(b).

20 <sup>7</sup> 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

21 <sup>8</sup> *Id.* §§ 404.1520(c), 416.920(c).

22 <sup>9</sup> *Id.* §§ 404.1520(c), 416.920(c).

1 Step three compares the claimant's impairments to several recognized by the  
2 Commissioner to be so severe as to preclude substantial gainful activity.<sup>10</sup> If an  
3 impairment meets or equals one of the listed impairments, the claimant is  
4 conclusively presumed to be disabled.<sup>11</sup> If an impairment does not, the disability-  
5 evaluation proceeds to step four.

6 Step four assesses whether an impairment prevents the claimant from  
7 performing past work by determining the claimant's residual functional capacity  
8 (RFC).<sup>12</sup> If the claimant is able to perform prior work, benefits are denied.<sup>13</sup> If the  
9 claimant cannot perform prior work, the disability-evaluation proceeds to step five.

10 Step five, the final step, assesses whether the claimant can perform other  
11 substantial gainful work—work that exists in significant numbers in the national  
12 economy—considering the claimant's RFC, age, education, and work experience.<sup>14</sup>  
13 If so, benefits are denied. If not, benefits are granted.<sup>15</sup>  
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16 <sup>10</sup> *Id.* §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

17 <sup>11</sup> *Id.* §§ 404.1520(d), 416.920(d).

18 <sup>12</sup> *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

19 <sup>13</sup> *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

20 <sup>14</sup> 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,  
21 1497-98 (9th Cir. 1984).

22 <sup>15</sup> 20 C.F.R. §§ 404.1520(g), 416.920(g).  
23

1           The claimant has the initial burden of establishing entitlement to disability  
2 benefits under steps one through four.<sup>16</sup> At step five, the burden shifts to the  
3 Commissioner to show that the claimant is not entitled to benefits.<sup>17</sup>

## 4                           **II.     Factual and Procedural Summary**

5           Plaintiff filed Title II and XVI applications, alleging a disability onset date of  
6 December 31, 2012.<sup>18</sup> Her claims were denied initially and upon reconsideration.<sup>19</sup>  
7 A video administrative hearing was held before Administrative Law Judge Jesse  
8 Shumway.<sup>20</sup>

9           In denying Plaintiff's disability claims, the ALJ made the following findings:

- 10           • Step one: Plaintiff had not engaged in substantial gainful activity  
11           since December 31, 2012, the alleged onset date, through her date last  
12           insured of March 31, 2014.
- 13           • Step two: Plaintiff had the following medically determinable severe  
14           impairments: gender dysphoria, major depressive disorder,  
15           generalized anxiety disorder, unspecified personality disorder,

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16   <sup>16</sup> *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

17   <sup>17</sup> *Id.*

18   <sup>18</sup> AR 177-86.

19   <sup>19</sup> AR 88-94 & 99-112.

20   <sup>20</sup> AR 30-48.

1 attention deficit hyperactivity disorder (ADHD), bipolar disorder; and  
2 alcohol use disorder;

- 3 • Step three: Plaintiff did not have an impairment or combination of  
4 impairments that met or medically equaled the severity of one of the  
5 listed impairments;
- 6 • RFC: Plaintiff had the RFC to perform a full range of work at all  
7 exertional levels with the following nonexertional limitations:

8 (S)he is limited to simple, routine tasks consistent with a  
9 reasoning level of two or less; and (s)he can have only  
10 occasional, superficial contact with the public, coworkers,  
and supervisors.

- 11 • Step four: Plaintiff has no past relevant work; and
- 12 • Step five: considering Plaintiff's RFC, age, education, and work  
13 history, Plaintiff could perform work that existed in significant  
14 numbers in the national economy, such as cleaner/housekeeper,  
15 cafeteria attendant, and fish cleaner.<sup>21</sup>

16 When assessing the medical-opinion evidence, the ALJ found the state  
17 agency psychological consultants' Title XVI opinions that Plaintiff was not disabled  
18 highly persuasive and their Title II opinions that Plaintiff did not have a severe  
19 impairment before the date last insured.<sup>22</sup> The ALJ also found Plaintiff's medically

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21 <sup>21</sup> AR 12-29.

22 <sup>22</sup> AR 21-22.

1 determinable impairments could reasonably be expected to cause some of the  
2 alleged symptoms, but that her statements concerning the intensity, persistence,  
3 and limiting effects of those symptoms were not entirely consistent with the  
4 medical evidence and other evidence in the record.<sup>23</sup>

5 Plaintiff requested review of the ALJ's decision by the Appeals Council,  
6 which denied review.<sup>24</sup> Plaintiff timely appealed to this Court.

### 7 **III. Standard of Review**

8 A district court's review of the Commissioner's final decision is limited.<sup>25</sup> The  
9 Commissioner's decision is set aside "only if it is not supported by substantial  
10 evidence or is based on legal error."<sup>26</sup> Substantial evidence is "more than a mere  
11 scintilla but less than a preponderance; it is such relevant evidence as a reasonable  
12 mind might accept as adequate to support a conclusion."<sup>27</sup> Moreover, because it is  
13 the role of the ALJ and not the Court to weigh conflicting evidence, the Court  
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18 <sup>23</sup> AR 20-21.

19 <sup>24</sup> AR 1-6.

20 <sup>25</sup> 42 U.S.C. § 405(g).

21 <sup>26</sup> *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

22 <sup>27</sup> *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).  
23

upholds the ALJ's findings "if they are supported by inferences reasonably drawn from the record."<sup>28</sup> The Court considers the entire record as a whole.<sup>29</sup>

Further, the Court may not reverse an ALJ decision due to a harmless error.<sup>30</sup> An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination."<sup>31</sup> The party appealing the ALJ's decision generally bears the burden of establishing harm.<sup>32</sup>

#### IV. Analysis

##### A. Medical Opinions: Plaintiff fails to establish consequential error.

Plaintiff challenges the ALJ's 1) failure to assign any consideration to the limitations opined by her treating providers: Thomas Dillon, M.D., Benjamin Gonzalez, M.D., Bruce Wilson, M.D., Rikki Cook, LMHC, and Debra Pugh,

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<sup>28</sup> *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

<sup>29</sup> *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must consider the entire record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion," not simply the evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) ("An ALJ's failure to cite specific evidence does not indicate that such evidence was not considered[.]").

<sup>30</sup> *Molina*, 674 F.3d at 1111.

<sup>31</sup> *Id.* at 1115 (quotation and citation omitted).

<sup>32</sup> *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

1 PMHMP-BC; 2) finding that the Title XVI reviewing opinions of Dr. Brown and Dr.  
 2 Kester were highly persuasive; and 3) decision not to call a psychiatric medical  
 3 consultant to offer an opinion at the administrative hearing.

4 1. Standard<sup>33</sup>

5 An ALJ must consider and evaluate the persuasiveness of all medical  
 6 opinions or prior administrative medical findings.<sup>34</sup> The ALJ need not however  
 7 “give any specific evidentiary weight . . . to any medical opinion(s).”<sup>35</sup> A medical  
 8 opinion is a statement from a medical source about what the claimant can still do  
 9 despite her impairments and whether the claimant has one or more impairment-  
 10 related limitations in the following abilities:

- 11 • perform physical demands of work activities;
- 12 • perform mental demands of work activities (such as understanding,
- 13 remembering, carrying out instructions, maintaining concentration,
- 14

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15 <sup>33</sup> For claims filed on or after March 27, 2017, such as Plaintiff’s claims, new  
 16 regulations apply that change the framework for how an ALJ must evaluate  
 17 medical opinion evidence. Revisions to Rules Regarding the Evaluation of Medical  
 18 Evidence, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20 C.F.R. §§  
 19 404.1520c, 416.920c.

20 <sup>34</sup> 20 C.F.R. §§ 404.1520c(a), (b), 416.920c(a), (b).

21 <sup>35</sup> Revisions to Rules, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R.  
 22 §§ 404.1520c(a), 416.920c(a).  
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1 persistence, or pace, and responding appropriately to supervision, co-  
 2 workers, or work pressures in a work setting);

- 3 • perform sensory demands of work; and
- 4 • adapt to environmental conditions.<sup>36</sup>

5 The factors for evaluating the persuasiveness of medical opinions and prior  
 6 administrative medical findings include, but are not limited to, supportability,  
 7 consistency, relationship with the claimant, and specialization.<sup>37</sup> Supportability  
 8 and consistency are the most important factors, and the ALJ is required to explain  
 9 how both of these factors were considered:<sup>38</sup>

10 (1) Supportability. The more relevant the objective medical evidence  
 11 and supporting explanations presented by a medical source are to  
 12 support his or her medical opinion(s) or prior administrative medical  
 finding(s), the more persuasive the medical opinions or prior  
 administrative medical finding(s) will be.

13 (2) Consistency. The more consistent a medical opinion(s) or prior  
 14 administrative medical finding(s) is with the evidence from other

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15 <sup>36</sup> 20 C.F.R. §§ 404.1513(a), 416.913(a).

16 <sup>37</sup> *Id.* §§ 404.1520c(c)(1)-(5), 416.920c(c)(1)-(5). When assessing the medical source's  
 17 relationship with the claimant, the ALJ is to consider the treatment length,  
 18 frequency, purpose, and extent, and whether an examination was conducted. *Id.*  
 19 The ALJ may also consider whether the medical source has familiarity with the  
 20 other record evidence or an understanding of the disability program's policies and  
 21 evidentiary requirements. *Id.*

22 <sup>38</sup> *Id.* §§ 404.1520c(b)(2), 416.920c(b)(2).  
 23

1 medical sources and nonmedical sources in the claim, the more  
 2 persuasive the medical opinion(s) or prior administrative medical  
 finding(s) will be.<sup>39</sup>

3 Typically, the ALJ may, but is not required to, explain how the other factors were  
 4 considered.<sup>40</sup>

## 5 2. Treating Providers

6 Plaintiff received counseling, medication management, and gender-  
 7 transition medical care from several medical providers, including Dr. Dillon, Dr.  
 8 Gonzalez, Dr. Wilson, Ms. Cook, and Ms. Pugh. Plaintiff contends the ALJ erred by  
 9 not considering the limitations opined by these providers. However, Plaintiff fails  
 10 to identify a medical opinion issued by these medical providers. The records  
 11 highlighted by Plaintiff include the medical providers' observations and findings or  
 12 a summary of Plaintiff's reports. These records did not include the medical source's  
 13 opinion about what Plaintiff can do despite her impairments or what Plaintiff's  
 14 impairment-related limitations or restrictions are regarding her ability to perform  
 15 the mental demands of work. Because these medical providers did not issue

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 17 <sup>39</sup> *Id.* §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2).

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 19 <sup>40</sup> *Id.* §§ 404.1520c(b)(2), 416.920c(b)(2). When two or more medical opinions or  
 20 prior administrative findings “about the same issue are both equally well-  
 21 supported . . . and consistent with the record . . . but are not exactly the same,” the  
 22 ALJ is required to explain how “the other most persuasive factors in paragraphs  
 23 (c)(3) through (c)(5)” were considered. *Id.* §§ 404.1520c(b)(3), 416.920c(b)(3).

1 medical opinions, the ALJ did not error. Moreover, the ALJ's analysis reveals that  
2 he considered the records from these medical providers, including their  
3 observations and findings and their summary of Plaintiff's reports. Plaintiff fails to  
4 establish that the ALJ erred as to Plaintiff's treating providers.

5 3. Reviewing Opinions

6 Plaintiff challenges the finding by the ALJ that Dr. Brown's and Dr. Kester's  
7 reviewing Title XVI opinions were highly persuasive.<sup>41</sup> Dr. Brown and Dr. Kester  
8 reviewed the medical file in July and September 2017, respectively, and opined  
9 that Plaintiff's abilities to understand, remember, and apply information, and  
10 adapt and manage herself were mildly limited and that her abilities to interact  
11 with others and concentrate, persist, or maintain pace were moderately limited.<sup>42</sup>  
12 These doctors also found that Plaintiff was moderately limited in her abilities to  
13 carry out detailed instructions, maintain attention and concentration for extended  
14 periods, work in coordination with or in proximity to others without being  
15 distracted by them, interact with the general public, coworkers, and peers, and  
16 complete a normal workday or workweek without interruptions from  
17 psychologically based symptoms and to perform at a consistent pace without an

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19 <sup>41</sup> As mentioned earlier, the ALJ found Dr. Brown's and Dr. Kester's Title XVI  
20 opinions highly persuasive but did not find their Title II opinions—that Plaintiff  
21 did not have a severe impairment before the date last insured—persuasive.

22 <sup>42</sup> AR 54-68 & 71-87.  
23

1 unreasonable number and length of rest periods. Notwithstanding these  
2 limitations, Dr. Brown and Dr. Kester opined that Plaintiff retained the ability to  
3 sustain concentration and pace for simple, routine tasks if she performed work that  
4 only required superficial interaction with the public, coworkers, and supervisors.

5 The ALJ found Dr. Brown's and Dr. Kester's opinions highly persuasive  
6 because they were consistent with the objective and observational findings and  
7 Plaintiff's allegations, as tempered by her treatment history. First, the objective  
8 and observational findings reflected that Plaintiff suffered severe anxiety and  
9 depression, gender dysphoria, and other mental health symptoms. These  
10 impairments primarily impacted her mood and affect without limiting her ability  
11 to communicate, cooperate, maintain attention, and concentrate and typically did  
12 not more than mildly to moderately limit her thought content, judgment, or  
13 insight.<sup>43</sup> Plaintiff challenges the ALJ's reliance on these 2017 opinions because  
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15 <sup>43</sup> See, e.g., AR 379-80 (11/26/12: appropriate dress, cooperative, normal/slow  
16 speech, sad/depressed, anxious, irritable, congruent mood, goal-directed thought  
17 process, no suicidal or homicidal intent, and good concentration); AR 283-84  
18 (12/27/12: appropriate dress, cooperative, speech normal, sad/depressed, congruent  
19 mood, goal directed, no abnormal thought content or suicidal or homicidal intent,  
20 intact insight/judgment, orientated, intact recent and remote memory, intact  
21 attention/concentration, and excellent fund of knowledge); AR 373 (5/16/13:  
22 constricted/flat affect, depressed mood, well-groomed, intact thought process,  
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1 they were issued without considering the medical records from 2018 and 2019.  
 2 However, Plaintiff's noted presentation and the observational findings were  
 3 generally consistent over the longitudinal medical record. The ALJ rationally found  
 4 that Dr. Brown's and Dr. Kester's opinions were consistent with the objective and  
 5 observational findings.<sup>44</sup>

6 Second, the ALJ found Dr. Brown's and Dr. Kester's opinions were  
 7 consistent with Plaintiff's allegations as tempered by her treatment history.  
 8 Plaintiff alleged that her impairments were disabling because they impacted her  
 9 ability to talk, complete tasks, concentrate, understand, follow instructions, use her  
 10 hands, and remember things. The ALJ discounted Plaintiff's symptoms because, in  
 11 part, Plaintiff's course of treatment was of low intensity, consisting of

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13 appropriate verbal behavior, orientated, normal insight, and intact memory, but  
 14 claimant reports a memory problem); AR 296 (11/6/13: well-dressed and groomed,  
 15 orientated, normal speech, normal thought processes and content, logical  
 16 associations, normal judgment and insight, normal recent and remote memory,  
 17 normal attention and concentration, normal fund of knowledge, and depressed  
 18 affect); *see also* AR 297-99 (11/14/13); AR 310 (1/10/14); AR 320 (9/20/16); AR 325  
 19 (9/27/16); AR 395 (2/21/17); AR 399 (3/7/17); AR 315 (5/12/17); AR 369 (8/11/17); AR  
 20 417 (1/8/18); AR 429 (10/24/18); AR 432 (11/15/18); AR 438-39 (2/1/19); & AR 470-72  
 21 (4/5/19).

22 <sup>44</sup> *See, e.g.*, AR 416, AR 419, AR 428, & AR 434.  
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1 approximately monthly counseling, and medication management every few  
2 months. As is discussed more below, the Court finds that this articulated reason is  
3 not supported by substantial evidence. The ALJ needed to offer more explanation  
4 as to why Plaintiff's course of treatment was "low intensity" treatment for her  
5 conditions. However, any error in characterizing Plaintiff's course of treatment as  
6 low intensity is harmless as the ALJ appropriately considered the type and nature  
7 of the treatment Plaintiff received and assessed the notes, observations, and  
8 findings made by the treating providers. As is discussed above, the ALJ rationally  
9 found the objective medical record is consistent with Dr. Brown's and Dr. Kester's  
10 Title XVI opinions.

11 4. Medical Expert

12 Plaintiff contends the ALJ erred by not calling a medical expert at the  
13 administrative hearing to offer an opinion as to Plaintiff's functional limitations.  
14 This is not a case where a medical expert was needed to opine as to the disability  
15 onset date; nor was the evidence sufficient to require an ALJ to receive a listings or  
16 limitations opinion from a medical expert.<sup>45</sup> Plaintiff fails to establish error in this  
17 regard.

18 **B. Symptom Complaints: Plaintiff fails to establish consequential error.**

19 Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
20 convincing in discrediting her symptom claims. An ALJ engages in a two-step  
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22 <sup>45</sup> Hearing, Appeals, and Litigation Law Manual (HALLEX) I-2-5-32 & I-2-5-34.  
23

1 analysis to determine whether to discount a claimant's testimony regarding  
2 subjective symptoms.<sup>46</sup> "First, the ALJ must determine whether there is objective  
3 medical evidence of an underlying impairment which could reasonably be expected  
4 to produce the pain or other symptoms alleged."<sup>47</sup> "The claimant is not required to  
5 show that [the claimant's] impairment could reasonably be expected to cause the  
6 severity of the symptom [the claimant] has alleged; [the claimant] need only show  
7 that it could reasonably have caused some degree of the symptom."<sup>48</sup>

8         Second, "[i]f the claimant meets the first test and there is no evidence of  
9 malingering, the ALJ can only reject the claimant's testimony about the severity of  
10 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
11 rejection."<sup>49</sup> General findings are insufficient; rather, the ALJ must identify what  
12 symptom claims are being discounted and what evidence undermines these  
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19 <sup>46</sup> Social Security Ruling (SSR) 16-3p, 2016 WL 1119029, at \*2.

20 <sup>47</sup> *Molina*, 674 F.3d at 1112 (quotation marks omitted).

21 <sup>48</sup> *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

22 <sup>49</sup> *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations omitted).  
23

1 claims.<sup>50</sup> “The clear and convincing [evidence] standard is the most demanding  
2 required in Social Security cases.”<sup>51</sup>

3 Factors to be considered in evaluating the intensity, persistence, and  
4 limiting effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
5 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
6 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
7 side effects of any medication an individual takes or has taken to alleviate pain or  
8 other symptoms; 5) treatment, other than medication, an individual receives or has  
9 received for relief of pain or other symptoms; 6) any measures other than  
10 treatment an individual uses or has used to relieve pain or other symptoms; and 7)  
11 any other factors concerning an individual’s functional limitations and restrictions  
12 due to pain or other symptoms.<sup>52</sup> The ALJ is instructed to “consider all of the  
13 evidence in an individual’s record” to “determine how symptoms limit ability to  
14 perform work-related activities.”<sup>53</sup> Here, the ALJ found Plaintiff’s statements  
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16 <sup>50</sup> *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995), and *Thomas v.*  
17 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently  
18 explain why he discounted claimant’s symptom claims)).

19 <sup>51</sup> *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r*  
20 *of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

21 <sup>52</sup> SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §§ 404.1529(c), 416.929(c).

22 <sup>53</sup> SSR 16-3p, 2016 WL 1119029, at \*2.  
23



1 concerning the intensity, persistence, and limiting effects of her symptoms  
 2 inconsistent with the objective medical evidence, her activities, the low-level  
 3 treatment, and the recommendation by her provider that she work.<sup>54</sup>

4 First, as to the ALJ's finding that Plaintiff's symptom reports were  
 5 inconsistent with the objective record and clinical observations, symptom reports  
 6 cannot be solely discounted on the grounds that they were not fully corroborated by  
 7 the objective medical evidence.<sup>55</sup> However, objective medical evidence is a relevant  
 8 factor in considering the severity of the reported symptoms.<sup>56</sup> "Objective medical  
 9 evidence" means signs, laboratory findings, or both.<sup>57</sup> In turn, "signs" is defined as:

10 one or more anatomical, physiological, or psychological abnormalities  
 11 that can be observed, apart from [the claimant's] statements  
 12 (symptoms). Signs must be shown by medically clinical diagnostic  
 13 techniques. Psychiatric signs are medically demonstrable phenomena  
 14 that indicate specific psychological abnormalities, e.g., abnormalities  
 of behavior, mood, thought, memory, orientation, development, or  
 perception, and must also be shown by observable facts that can be  
 medically described and evaluated.<sup>58</sup>

15 Here, the ALJ found that, although Plaintiff had considerable anxiety,  
 16 depression, and at times irritability, along with her gender dysphoria, the objective

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18 <sup>54</sup> AR 20-22.

19 <sup>55</sup> See *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

20 <sup>56</sup> *Id.*

21 <sup>57</sup> 20 C.F.R. §§ 404.1502(f), 416.902(k).

22 <sup>58</sup> *Id.* §§ 404.1502(g), 416.902(l).

1 record and clinical observations showed adequate grooming, hygiene, cooperation,  
2 eye contact, psychomotor activity, speech, memory, and concentration.<sup>59</sup> The ALJ  
3 also found that Plaintiff's insight and judgment were sometimes limited and her  
4 thought process illogical at times.<sup>60</sup> While the ALJ acknowledged that some of  
5 Plaintiff's reported symptoms were consistent with the objective observations, the  
6 ALJ found these clinical observations and objective findings were inconsistent with  
7 Plaintiff's extreme reports that she was unable to sustain adequate memory,  
8 concentration, and attendance at work due to her impairments, namely her intense  
9 anxiety being around people and associated panic attacks. The ALJ's finding is  
10 supported by substantial evidence. While the record reflects that Plaintiff struggles  
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12 <sup>59</sup> AR 21 (citing AR 379-80 (11/26/12); AR 283-84 (12/27/12); AR 296 (11/6/13); AR  
13 297-99 (11/14/13); AR 310 (1/10/14); AR 320 (9/20/16); AR 325 (9/27/16); AR 395  
14 (2/21/17); AR 399 (3/7/17); AR 369 (8/11/17); AR 429 (10/24/18); AR 432 (11/15/18);  
15 AR 438-39 (2/1/19); & AR 470-72 (4/5/19)). The ALJ also noted that Plaintiff  
16 demonstrated normal mood on some occasions. Yet, these were observations made  
17 during appointments for physical-health conditions. On this record, which contains  
18 a significant number of mental-health treatment records, the Court bases its  
19 substantial-evidence decision solely on the mental-health treatment records and  
20 not the physical-health treatment records. *See* AR 19 (citing AR 348, 353, 385, 448,  
21 454, & 739).

22 <sup>60</sup> *Compare* ARs *supra* with AR 315 (5/12/17), AR 369 (8/11/17), & AR 417 (1/8/18).  
23

1 with her mood and anxiety, the mental status findings and observations do not  
2 reflect that Plaintiff's mood and anxiety—or medications—impacted her  
3 concentration and memory to the extent that Plaintiff reports. The ALJ rationally  
4 found Plaintiff's extreme reports inconsistent with the clinical observations and  
5 findings, which generally noted that Plaintiff's memory and fund of knowledge  
6 were adequate except for slight deficiency in recall.<sup>61</sup> Moreover, consistent with  
7 Plaintiff's observed impacted anxiety and mood and sometimes limited thought  
8 content and judgment, the RFC limited Plaintiff to simple, routine tasks with a  
9 lower-level reasoning and with only occasional, superficial contact with the public,  
10 coworkers, and supervisors. That the objective medical evidence was inconsistent  
11 with Plaintiff's reported disabling limitations was a relevant factor for the ALJ to  
12 consider.

13 Second, the ALJ discounted Plaintiff's symptom reports because they were  
14 inconsistent with her history of activities, including nearly completing an associate  
15 degree, driving, leaving the house alone, caring for pets, engaging in self-care, and  
16 completing basic chores. An ALJ may consider whether a claimant's exertional and  
17 non-exertional activities are inconsistent with the claimant's reported disabling  
18 symptoms.<sup>62</sup> Here, the ALJ found the activities that Plaintiff performed were like  
19 activities performed in a variety of occupations. Plaintiff highlights that her  
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21 <sup>61</sup> See, e.g., AR 369, 371-76, 432, 435, 438, 444, 471, & 477.

22 <sup>62</sup> *Molina*, 674 F.3d at 1113; *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

1 attendance at community college spanned four to five years—a much slower rate  
2 than a full-time student. The record is clear—as the ALJ so found—that Plaintiff’s  
3 anxiety, depression, and other impairments limit her. Recognizing that it is  
4 difficult for Plaintiff to be around others due to her social anxiety and that it  
5 impacts her ability to function, the ALJ rationally crafted an RFC that limited  
6 Plaintiff to occasional, superficial contact with the public, coworkers, and  
7 supervisors. Moreover, the ALJ then restricted Plaintiff to simple and routine  
8 tasks with a reasoning level of two or less. Plaintiff’s activities reveal an ability to  
9 sustain concentration and attention for lower-level reasoning tasks when her  
10 contact with others is limited. The ALJ rationally found that Plaintiff’s activities  
11 reflected attention, concentration, and other non-exertional abilities greater than  
12 the abilities reported by Plaintiff.

13 Third, the ALJ found that Plaintiff had been advised that working would  
14 likely improve her mental health symptoms. An ALJ may consider any factor  
15 concerning the claimant’s functional limitations and restrictions—or lack thereof.<sup>63</sup>  
16 While a recommendation by a medical provider that a claimant return to full-time  
17 work is relevant information for the ALJ to consider, here, the Court finds that the  
18 cited note does not support the ALJ’s finding:<sup>64</sup>

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21 <sup>63</sup> 20 C.F.R. §§ 404.1529(c)(3)(vii) & 416.929(c)(3)(vii).

22 <sup>64</sup> See AR 21 (citing AR 340).

1 TOPICS DISCUSSED: PT. FEELING LESS ANXIETY BUT CONTINUES TO HAVE FEARS OF  
2 DYING AND GOING TO WORK. PT. FEELS HE IS NOT WORTHY OF AS WE ATTEMPTED  
3 REALISTIC SELF-TALK METHODS TO REDUCE PANIC AND FEAR OF DYING, PT. UNDERSTANDS  
4 WHAT HE NEEDS TO GO TO WORK BUT SAYS HE IS "SCARED OF WORKING." WE UTILIZED  
5 HIS KNOWLEDGE OF EXPOSURE TREATMENT BUT UNABLE TO MOTIVATE PT. TO SEEK  
6 VOCATIONAL OPPORTUNITIES AT THIS TIME.

7 This cited note does not contain a clear recommendation by the therapist, who was  
8 meeting with Plaintiff for only the second time, that Plaintiff perform and sustain  
9 full-time work to improve her mental health. Rather the counselor discussed the  
10 idea of working with Plaintiff to motivate her beyond her anxiety and fears. This  
11 note does not constitute substantial evidence to support the ALJ's finding that a  
12 mental health provider advised Plaintiff that work would likely improve her  
13 mental-health symptoms. This error is inconsequential, however, because the ALJ  
14 offered two other clear and convincing reasons supported by substantial evidence—  
15 inconsistency with the objective medical evidence and Plaintiff's activities—to  
16 discount Plaintiff's reported symptoms.

17 Finally, the ALJ discounted Plaintiff's reported symptoms because her  
18 course of treatment was of low intensity, consisting of approximately monthly  
19 counseling and medication management every few months. An ALJ may consider  
20 the amount and type of treatment when assessing the intensity and persistence of  
21 the claimant's symptoms.<sup>65</sup> The record reflects that Plaintiff generally received  
22 monthly counseling from November 2012 to September 2013, then routine  
23 medication management from August 2016 through December 2018, with

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<sup>65</sup> 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4).

1 counseling resuming in September 2016 through March 2017, and then resuming  
2 with counseling in January 2018. While there are gaps in mental health counseling  
3 and treatment since the alleged onset date in December 2012, the ALJ did not  
4 discount Plaintiff's reported symptoms due to gaps in treatment but instead due to  
5 low-intensity treatment (i.e., only counseling and medication management). There  
6 is no information in this record indicating that a person with Plaintiff's  
7 impairments would benefit from a higher intensity treatment or what constitutes  
8 high intensity treatment. Accordingly, without further explanation by the ALJ or  
9 supporting evidence, the ALJ's proffered reason—that Plaintiff received a  
10 purported low-intensity course of treatment—was not a clear and convincing  
11 reason to discount her symptom reports. This error is inconsequential however  
12 because the ALJ offered other clear and convincing reasons supported by  
13 substantial evidence to discount Plaintiff's symptom reports.

14 In summary, Plaintiff fails to establish the ALJ erred by discounting her  
15 symptom reports.

16 **C. Step Five: Plaintiff fails to establish error.**

17 Plaintiff argues that the ALJ's hypothetical failed to consider the limitations  
18 set forth by her providers, including her inability to maintain productivity, pace,  
19 work quality, and necessary attendance. "[T]he ALJ is responsible for translating  
20 and incorporating clinical findings into a succinct RFC."<sup>66</sup> Plaintiff's step-five  
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22 <sup>66</sup> *Rounds v. Comm'r of Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015).

1 argument merely restates her earlier allegations of error, which are not supported  
2 by the record. Accordingly, the ALJ's hypothetical and RFC properly accounted for  
3 the limitations supported by the record.<sup>67</sup> There was no step-five error.

4 **V. Conclusion**

5 Accordingly, **IT IS HEREBY ORDERED:**

- 6 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.  
7 2. The Commissioner's Motion for Summary Judgment, **ECF No. 15**, is  
8 **GRANTED**.  
9 3. The Clerk's Office shall enter **JUDGMENT** in favor of the  
10 Commissioner.  
11 4. The case shall be **CLOSED**.

12 **IT IS SO ORDERED.** The Clerk's Office is directed to file this Order and  
13 provide copies to all counsel.

14 **DATED** this 13<sup>th</sup> day of April 2021.

15  
16 s/Edward F. Shea  
EDWARD F. SHEA  
17 Senior United States District Judge

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<sup>67</sup> See *Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989) (allowing ALJ to  
22 limit a hypothetical to restrictions supported by substantial evidence).  
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